

The foregoing represents an overview of the more egregious errors of the FCC action.²⁴ Though they do not exhaust all of the issues which may be raised in a brief on the merits, the FPSC submits that the foregoing showing demonstrates a substantial likelihood of success on the merits.²⁵

b. Has the petitioner shown that without such relief, it will be irreparably injured?

Deprivation of a constitutional right by itself constitutes irreparable injury.²⁶ The FPSC submits that the FCC arrogation of power violates the Tenth Amendment to the United States Constitution. Florida asserts that in addition to the explicit grants of state authority in the act, the FPSC as agent of the sovereign State of Florida retains those inherent powers traditionally carried out by the State in the absence of explicit Congressional preemption; the FCC has, therefore, violated the

²⁴ The FPSC also has concerns, including but not limited to, the FCC's assertion of its Section 208 authority, that may well exceed the FCC's statutory authority. Order at ¶128.

²⁵ The stronger the case as to the likelihood of success on the merits, the less powerful the showing of irreparable harm needs to be. See, e.g., State of Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288, 290 (6th Cir. 1987) (probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent a [stay]).

²⁶ See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, sec. 2948, 1 at 161 (West 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"); see also Elrod v. Burns, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury").

Tenth Amendment to the United States Constitution. As such this violates 5 U.S.C. (2)(B).

As the Court opined in S.R. Koog v. United States, 79 F.d 3rd 452, 456 (5th Cir. 1996), the "Supreme Court forcefully and emphatically concluded":

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

quoting New York v. United States, 505 U.S. 144, 167-169, 112 S.Ct. 2408, 2424 131 L. Ed. 2d 881 (1995).

The unlawful arrogation of sovereignty without authority of law irreparably injures the State of Florida and its citizens. Congress crafted a scheme whereby a state regulatory agency such as the FPSC is the primary adjudicator of virtually all disputes pursuant to state and federal law. See generally Sections 251; 252, Federal Act. As demonstrated in the previous section (a. above), state authority is expressly preserved by the federal Act itself.

Nothing is more important than jurisdiction and the related taking of Constitutional rights. Once the federal government takes power, it never seems to return to the State or the people. See Tenth Amendment, U.S. Constitution. The FPSC urges this Court to

declare that the unlawful seizure of this police power jurisdiction by the federal agency constitutes irreparable harm to Florida citizens. (See Section d.1 below).

The FPSC can demonstrate a number of examples of real world irreparable harm to the Florida business community and Florida ratepayers generally. The FPSC will also cite individual examples of irreparable harm. First, the predictability and continuity of the existing pro-competition regulatory system can and must be preserved as the State evolves to a fully competitive telecommunications system. Business people need stability and predictability as we move forward. Chaos would ensue if the federal usurpation at issue here takes place, where parties materially change position in reliance on same, and then the State position is upheld on appeal. This is in no one's interest, and represents the absolute worst public policy - a constantly vacillating, changing order. This would cause everyone in the State to be unsure of what the policy is.

The harm would extend to many small and large Florida businesses for whom telecommunications is the lifeblood.²⁷ These interests simply do not need abrupt stops and starts. The case specific example contained in Section a.2. concerning loop costs is instructive here. Florida-bred competition is alive and well. See the Introduction above. The FCC should allow this system to

²⁷ Florida as a tourist destination state must have access to the finest and most economical telecommunications available.

continue by granting a stay until these serious (See 1.a. above) questions of law are answered. Without a stay, virtually every Florida business could be adversely affected.

Residential customers are often confused by the post-divestiture telephone world of today. The FPSC is in the best position to educate and generally help customers make the transition to an even more diverse telecommunications market.²⁸ This is exactly what the Florida Legislature and Congress envisioned. See 364.01, Florida Statutes 1995. §§251, 252, Federal Act. Maintaining the transition to the more competitive world which has already begun will best serve the needs of these customers. The spectre of on again, off again rules adversely affects residential customers as well.

From the business community to Florida's large elderly population, irreparable harm exists when the rules change and perhaps change back in the middle of the game. The FPSC respectfully requests this Court to find irreparable harm in the active customer confusion and related cynicism which will result in the absence of a stay.

The FPSC is concerned about sending the wrong economic signal to the business community. If entrepreneurs enter into the local market based on the wrong pricing signals, then harm will result to many, including investors. It is reasonable to assume that if a

²⁸ See generally Section d.1. below.

firm enters the local market based on interconnection rates and resale rates that are artificially low and thus offers a pricing schedule to consumers that could not be sustained when costs to the provider are increased, then harm will come. Prices could be increased, services could be reduced or the provider may become so weak as to be ineffective and go out of business. Under each one of these conditions, the consumer does not benefit, and in the long run, could be served by a market with fewer viable competitors.

The FPSC is concerned about certain markets sustaining a number of competitors. The cost signals to new entrants have to be realistic in order for them to enter the market and have any chance for success. Projecting costs of doing business artificially low raises a false sense of success and in the long run cannot benefit market competition. It will unreasonably delay effective competition.

If unrealistic costs of entry result in entrants making capital expenditures for outside plant facilities, economic waste is compounded. These uneconomic investments will have an impact in various ways, including how consumers react, how investors react, and how Wall Street reacts to unsuccessful entrants into the local markets. Such results will eventually spill over onto the consumer.²⁹ This, too, constitutes irreparable harm.

²⁹ See attached affidavit of Walter D'Haeseleer at Appendix IV.

If the Order is not stayed, there will be further potential for harm because of the FCC's vision of the "competition trilogy" - interconnection, universal service reform, and access charge reform. (Order at ¶6) The interrelationship of these proceedings at the FCC is undeniable. If the Order is not stayed, the FCC is likely to continue to rely on this flawed jurisdictional analysis in those future proceedings. The FCC will adopt universal service rules by May 8, 1997. (Order at ¶7) The FCC will complete access reform before or concurrently with a final order on universal service (Order at ¶8), and has stated its intent to issue proposed rules by November. The application of this erroneous jurisdictional framework to those proceedings will compound the irreparable harm.

These eggs cannot be unscrambled if a stay is not granted. All of these factors conclusively demonstrate irreparable harm.

c. Would the issuance of a stay substantially harm other parties interested in the proceedings?

Granting of a brief stay will not adversely affect parties. As noted in the Introduction, the Florida Commission has already taken numerous actions relating to the competitive carriage of traffic. All classes of carriers, including as interexchange carriers, have participated in and continue to participate in FPSC hearings.

The stay would preserve the existing competitive system until the significant statutory and constitutional questions are

answered. Local competition, one of the principal goals of the 1996 Federal Act, is in place in Florida. Florida has certificated 38 alternative local exchange companies in Florida.³⁰ As discussed above, the stops and starts are what damage the players in these markets. The FPSC believes the parties will not be substantially harmed if a stay is granted.

d. Where lies the public interest?

1. The Public Interest Lies in Issuance of a Stay

The FPSC is vested with exclusive jurisdiction over intrastate telecommunications services. 364.01(2), Florida Statutes. See also 152(b), Federal Act. (Appendix III). As a legislative entity (See Section 350.001, Florida Statutes, 1995), the FPSC is responsible to the Florida Legislature for carrying out the will of Floridians as expressed through the Legislature. As noted earlier, one of the most fundamental reasons that the illegal shifting of power from the state to federal government constitutes irreparable harm relates to the quality of the regulation itself.

The Florida Public Service Commission is created pursuant to Chapter 350, Florida Statutes. The five member commission is appointed by the Governor and has jurisdiction over certain water and wastewater companies, Chapter 367, Florida Statutes, electric and gas companies, Chapter 366, Florida Statutes, and as relevant

³⁰ See the attached affidavit of Richard Tudor at Appendix V.

here, telecommunications companies, Chapter 364, Florida Statutes. The Commissioners themselves hear the vast majority of contested cases. Further, all parties have the right of cross-examination. See Section 120.57, Florida Statutes. Citizens often appear by the busload to relate concerns to Commissioners. The FPSC also holds evidentiary hearings all over the vast, varied State of Florida and often hears citizens' as well as expert testimony.

The FCC, on the other hand, holds "paper hearings" whereby everyone comments and replies in writing and the agency, after review of the written submissions, issues an order. This is not to denigrate the FCC process but simply to demonstrate that the Florida Commission knows Florida conditions and the needs and desires of Florida citizens and businesses.³¹ The FCC is far removed from this reality. The FPSC believes that this is why the Congress vested the bulk of the day-to-day decisionmaking authority in the State commissions. As the telecommunications industry continues to evolve and dramatically change, the State commissions serve an important informational function in helping consumers cope

³¹ But John Marks, a Tallahassee lawyer who was chairman of the PSC in the mid-1980s, says the regional Bell companies and state regulators both have legitimate grievances with the FCC. "I'm inclined to believe that when it comes to local issues such as these, state regulatory commissions tend to have a better handle on things than the FCC," Marks says. "We don't always like the Florida PSC, they don't always do the right thing, but it's a reasonably fair forum," for consumers, says Monte Belote, executive director of the Florida Consumer Action Network. Miami Herald, September 10, 1996, at B1 and B11. The entire text of the article appears as Appendix VI.

with the changes. Last year, the FPSC logged 8,412 complaint calls through an 800 number, with 5,673 or 67.44% related to telephone companies.³²

The public interest lies in the FPSC continuing to have a meaningful role in regulatory decisionmaking. This is clearly the Florida Legislative and Congressional intent. The hands-on knowledge of the FPSC of Florida citizens and business helps the FPSC decide how to properly structure the transition to the new competitive process. This role is no less than the citizens deserve. The public interest lies in accountable, accessible regulators rather than faceless federal officialdom. This is the system Florida has operated and will continue to operate if a brief stay is granted.

2. The Public Interest Favors Prompt Resolution of this Matter.

The public interest lies in prompt resolution of this matter. The FPSC believes that expedited treatment of the questions presented herein would be in the public interest. Irrespective of the outcome of these appeals, the FPSC stands ready to expedite oral argument, briefing and any other such matters as the Court may direct. An expedited decision serves all consumers' and providers' interest in that the vital provisioning of telephone service is a necessary service that residential and business customers must

³² FPSC Annual Report for 1995, p. 69-70. The same office actually took over 53,000 consumer calls in 1995. Id.

continue to receive at affordable rates. This is the case today and a brief stay to retain this status quo until this Commission can reach a decision is in the public interest.

CONCLUSION

The Florida Public Service Commission has demonstrated its entitlement to a stay based upon the above showings. The FPSC believes the cleanest way to go about a stay is to stay this matter nationwide, allowing progressive states such as Florida to continue toward the fully competitive world. At a minimum, the Commission should stay the jurisdictional findings listed while the appeal is pending.³³

The FCC has gone far beyond the statutory scheme promulgated by Congress. Therefore, the FPSC respectfully requests a stay as discussed above.

³³ In the FPSC's opinion, the Commission would need to stay, in the Final Report and Order, paragraphs 22, 24, 29, 41, 55, 62, 83-103, 111-120, 124-129, and in Part VII on Pricing of Interconnection and Unbundled Elements, paragraphs in VII(B)(1) and VII(B)(2), VII(C). The rules that would need to be stayed are Section 51.505, Forward-looking economic cost and Section 51.503, General Pricing Standards, Section 51.513, Proxies for Forward-Looking Economic Costs; 51.515, Application of Access Charges; 51.707 Proxies for Transport and Termination; 51.715(3), Interim Transport and Termination Pricing.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert D. Vandiver", is written over a horizontal line.

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September 18, 1996

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local)	CC Docket No. 96-98
Competition Provisions in the)	
Telecommunications Act of 1996)	
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion of the Florida Public Service Commission for Stay Pending Judicial Review has been sent to the following parties on the attached list.



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